

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

SEP 23 2019

UNITED STATES OF AMERICA,

v.

CRIMINAL NO. 2:18cr113

ADONIS PERRY,

Defendant.

ORDER

This matter comes before the court on the Defendant's Objections to the Report and Recommendation ("R&R") filed by the United States Magistrate Judge on the Defendant's "Motion to Dismiss Count One of Superseding Indictment" ("Motion"). The Defendant filed his Motion on October 3, 2018, ECF No. 32, and the United States filed a Response on October 17, 2018, ECF No. 35. On November 13, 2018, this court referred the Motion to United States Magistrate Judge Douglas E. Miller, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Criminal Procedure 59(b), to conduct hearings, including evidentiary hearings, and to submit to the undersigned district judge proposed findings of fact and recommendations for disposition of the Motion. ECF No. 49.

The Magistrate Judge held an evidentiary hearing on the Defendant's Motion on June 28, 2019. ECF No. 93. A transcript of the hearing was subsequently filed on July 15, 2019. ECF No. 96. The Magistrate Judge ordered supplemental briefing on July 25,

2019. ECF No. 97. The Defendant filed a supplemental brief on August 9, 2019, ECF No. 99, and the Government filed a supplemental brief on August 10, 2019, ECF No. 100. The R&R on the Defendant's Motion was filed on August 19, 2019. ECF No. 102. In the R&R, the parties were advised of their right to file written objections to the findings and recommendations made by the Magistrate Judge. Id. at 17-18. On August 26, 2019, the Defendant filed Objections to the R&R. ECF No. 105. On September 9, 2019, the United States filed a Response to the Defendant's Objections. ECF No. 107.

In his Motion, the Defendant argues that he was deprived of his Due Process rights under Arizona v. Youngblood, 488 U.S. 51 (1988), and California v. Trombetta, 467 U.S. 479 (1984), because the Government failed to preserve potentially exculpatory dashcam footage. ECF No. 32. The R&R recommends that the Defendant's Motion be denied because the Defendant failed to show that the government acted in bad faith in failing to preserve the dashcam footage, and because other evidence was available that was comparable to the dashcam footage. ECF No. 102. The Defendant objects to the Magistrate Judge's conclusion that the officers did not act in bad faith, and argues that the good faith analysis should be expanded to the Norfolk Police Department overall. ECF No. 105 at 2. The Defendant further objects to the Magistrate Judge's conclusion that there is ample alternative evidence to address the factual questions at issue. Id. at 3.

Pursuant to Rule 59(b)(3) of the Federal Rules of Criminal Procedure, the court, having reviewed the record in its entirety, shall make a de novo determination of those portions of the R&R to which the Defendant has specifically objected. FED. R. CRIM. PRO. 59(b)(3). The court may accept, reject, or modify, in whole or in part, the recommendation of the magistrate judge, or recommit the matter to him with instructions. Id.

Specifically, on reviewing the record, which includes the body camera footage included as Exhibit 1 to the Government's Response, ECF No. 35, this court agrees with the conclusion in the R&R that "there is ample alternative evidence, including a nearly identical recording of the scene from Officer Miller's body camera footage, which negates any prejudice to [the Defendant] from the lost dashcam video." ECF No. 102 at 9. Moreover, this court agrees with the conclusion in the R&R that the Defendant has not demonstrated bad faith in the Government's failure to preserve the evidence. Id. at 9-13.

In sum, the court has examined the Objections to the Magistrate Judge's R&R, has reviewed the record of the proceedings before the Magistrate Judge, and has made de novo findings with respect thereto. As such, this court **OVERRULES** the Defendant's Objections, and hereby **ADOPTS** and **APPROVES IN FULL** the findings of fact, recommendations, and legal conclusions, as set forth in the R&R of the United States Magistrate Judge filed on August 19, 2019.

The Clerk is **DIRECTED** to forward a copy of this Order to the Defendant's counsel and the Assistant United States Attorney.

/s/
Rebecca Beach Smith
United States District Judge

RB

REBECCA BEACH SMITH
UNITED STATES DISTRICT JUDGE

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